

1. 1508108 (Migration) [2016] AATA 3504 (10 March 2016)
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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Lee Richard Meredith
Ms Sinead Louise O Loghlin

CASE NUMBER: 1508108

DIBP REFERENCE(S): BCC2014/2751071 BCC2015/2574281

MEMBER: Carolyn Wilson

DATE: 10 March 2016

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:

- Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Statement made on 10 March 2016 at 1:29pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 June 2015 to refuse to grant the applicants Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
6. The applicants applied for the visas on 18 October 2014. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.186.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found a bogus document had been provided.
7. The applicants appeared before the Tribunal on 9 March 2016 to give evidence and present arguments.
8. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
11. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN A MATERIAL PARTICULAR?

12. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
13. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The delegate found the applicant provided a bogus document, based on advice from an officer of the Department working in the Australian High Commission in London. The officer had contacted the employer Mr Ian Smallman to verify a work reference dated 10 March 2015 which stated the applicant worked for his company IIS Groundworks Ltd as a subcontractor between 2008 and 2011. However, when the officer spoke to Mr Smallman he said he could not have worked those dates as the company was only incorporated in 2010 and that he had last provided a reference to the applicant some 9 months prior in 2014 and not in 2015. The delegate reasonably concluded the reference had not been provided by Mr Smallman and found it was a bogus document.
16. The applicant asserts the reference is a genuine document and provided evidence to support this. He speculates that Mr Smallman may not have been helpful with the Department, and subsequently also refused to assist the applicant to clarify the misunderstanding, because there may be negative tax implications for the applicant's prior employment. This is mere speculation however, and there may be any number of reasons why Mr Smallman denied providing that reference, including that he made an honest mistake when he couldn't recall sending the reference in question.
17. The applicant provided the Tribunal with strong evidence to support his claim that Mr Smallman did provide the reference dated 10 March 2015. That is, he provided the Tribunal with evidence of an email he received from Mr Smallman, also dated 10 March 2015, attaching the reference. The Tribunal relies on this evidence to find the reference was provided by Mr Smallman and is not a bogus document.
18. For these reasons, the Tribunal is satisfied there is no evidence the applicant has given a bogus document.
19. The Tribunal noted there are inconsistencies in the applicant's employment history, as provided to the Department. That is, there are inconsistencies in the information provided in the visa application form, his resume, the Form 80 and the employment references. The Tribunal has considered whether these inconsistencies amount to false or misleading information in a material particular.

20. The applicant conceded at hearing that the information he provided to the Department contained errors. He said he was concerned and regretful when he obtained a copy of the Department's file and realised himself there were inaccuracies in the information he provided. He said he regrets not engaging a migration agent when he lodged the application who could have assisted him to provide his information in a more consistent and coherent manner.
21. The Tribunal discussed the applicant's work history with him at the hearing, both in the United Kingdom and in Australia. The applicant had some difficulty remembering dates and the chronological order of where he had worked. He was clear however that after completing his apprenticeship he obtained the UK equivalent of an ABN and worked as a subcontractor for Mr Smallman (both before and after he incorporated IIS Groundworks Ltd) and NSF-WRC, amongst others, until coming to Australia.
22. The Tribunal came to the conclusion that the applicant's confusing and inconsistent work history, as provided to the Department, was a result of his inattention to detail when completing his application and a general difficulty in recalling dates. The Tribunal noted the applicant had difficulty in remembering dates even when speaking of matters such as when he came to Australia, and he could not easily recall the dates of recent employment in Queensland and Western Australia.
23. The Tribunal notes the applicant's employment history as a bricklayer is relevant to a material particular, that is cl.186.234, and the inconsistencies in his work history could be said to be misleading or false. However, PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception.¹ The Tribunal finds the applicant did not set out to deceive or mislead the Department, and as a qualified and experienced bricklayer there was no need to do so. The Tribunal accepts the applicant did not appreciate the importance of ensuring his work history was provided with accurate dates, but that there was no intent to commit fraud or deception. The Tribunal finds the errors in his work history do not amount to information that is false or misleading in a material particular.
24. For these reasons, the Tribunal is satisfied there is no evidence the applicant has given information that is false or misleading in a material particular.
25. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

26. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
27. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy cl.4020(1).
28. Therefore, cl.4020(2) is met.

¹*Trivedi v MIBP* at [32]. [54].

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

29. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
30. Based on the identity documents provided to the Department, including his passport details, the Tribunal finds the applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

31. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
32. There is no evidence before the Tribunal that the applicant or any member of his family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy cl.4020(2A).
33. Therefore cl.4020(2B) is met.

34. Conclusion

35. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.186.213.

DECISION

36. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:
 - Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Carolyn Wilson
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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